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Brief of Knox, Willcox & Bond for Defendant in Error.

IN THE

Supreme Court of the United States

Filed Dec. 28, 1896.

No. 676 OCTOBER TERM, 1896.

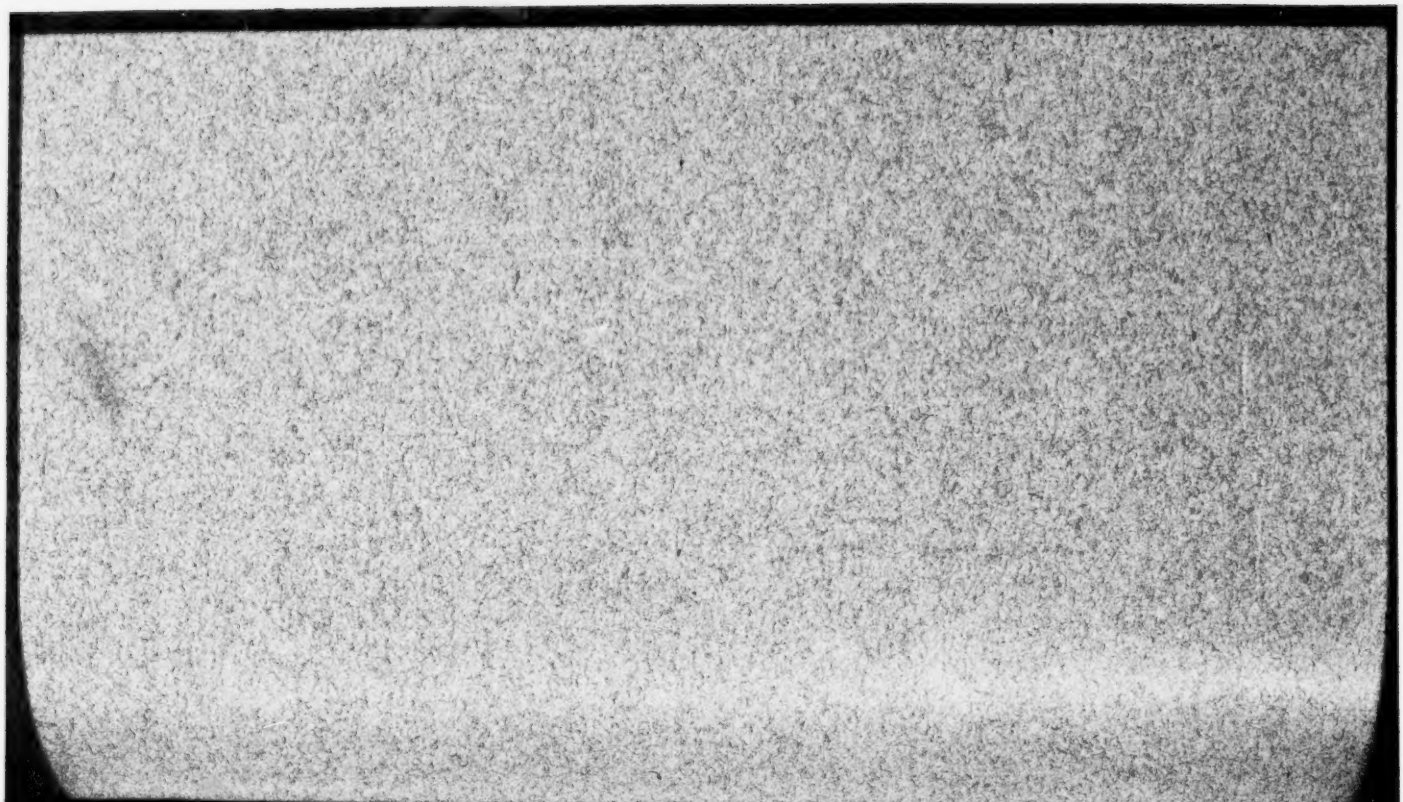
THE SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE CARNEGIE STEEL COMPANY,
Respondent.

Brief in Opposition to Petition for Certiorari.

P. C. KNOX,
DAVID WILLCOX,
NICHOLAS P. BOND,
Solicitors for Respondent.



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THE SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE CARNEGIE STEEL COMPANY, LIMITED,
Respondent.

BRIEF

In Opposition to Petition of Appellant for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

It is the settled rule of this Court that this branch of its jurisdiction (26 Statutes at Large, chap. 517, sec. 6, page 828,) "should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance in order to secure uniformity of decision." (American Constructions Co. vs. Jacksonville Railway Co., 148 U. S., 372; *In re* Woods, 143 U. S., 202; Lau Ow Bew's Case, 141 U. S., 583, and 144 U. S., 47.)

Under provisions of the same character the Court of Appeals of New York has just held that the power to grant a

certificate is intended primarily to provide for exceptional cases, where public interests or the interest of jurisprudence might be endangered by permitting a decision to go unchallenged, and the mere existence of errors prejudicial to the particular parties does not of itself warrant the allowance of an appeal. (Sciolina vs. Erie Preserving Co., 151 N. Y., 50.)

In pursuance of these principles this Court will not, in passing upon such a petition, inquire whether or not the Court below erred in its findings as to the facts, but will inquire whether or not the law declared upon the facts as found is so important in its immediate effects or so far reaching in its general consequences as to make the case exceptional in its character and to warrant the Court in granting the writ. Necessarily the writ will not be granted upon the allegation of errors prejudicial merely to the petitioner. If that should be recognized as sufficient ground, an application would naturally be presented whenever a litigant deemed himself aggrieved.

The brief in behalf of the petitioner refers to the case of Clarke vs. Central Railroad and Banking Company, No. 404 of the present term, as supporting the present application. But it has no such effect. That case involved the question whether where a railroad was operated under lease and the lessee had incurred liabilities for supplies, claims therefor remaining unpaid, could be charged upon the property of the lessor. It will be seen that this was a novel question and has no possible connection with that now involved.

The present case presents no new question of law; no new application of an old principle of law and no new principle of law. It establishes no rules of law of interest to others than the parties litigant. The question litigated below has been in reality whether or not facts existed such as to bring the respondent's claim within well established rules of law.

The facts found by the Court are as follows:

First. The original bill (the Clyde bill) was not a mortgagee's bill for the collection of a mortgage debt, but a

stockholder's and creditor's bill, filed with the assent of the corporation to preserve the system pending a reorganization.

Second. The mortgage trustee, though not a party to the bill originally, upon its own motion, became a party to this case shortly after the bill was filed, and united in the application for the appointment of permanent receivers.

Third. The foreclosure bill subsequently filed and consolidated with the Clyde bill was a part of the programme of which the Clyde bill was the initial performance, to wit, the reorganization of the property, not the collection of the debt.

Fourth. That the respondent, about one year prior to the appointment of receivers of the Richmond and Danville Railroad Company, contracted to sell to that company certain steel rails, to be delivered thereafter, for which the railroad company was to give to the respondent its notes payable at various dates.

Fifth. That the rails were delivered at sundry times, the last of them on October 10, 1891, and the notes of the railroad company given therefor, which notes, however, did not finally mature until after the appointment of the receivers.

Sixth. That the receivers earned large amounts over operating expenses, out of which they expended about half a million dollars for new construction and equipment on the mortgaged property, thereby increasing to that extent the mortgaged security, and otherwise applied the net income in their hands for the direct benefit of the mortgaged premises, leaving the debt due this respondent unpaid.

To this state of facts the Court below appled the decision of this Court in Burnham vs. Bowen, 111 U. S. 776, and we may state its decision in the very words used by this Court in that case, viz:

> (1.) "At the time of the appointment of the receivers, this was one of the current debts for operating expenses made in the ordinary course of a con-

tinuing business, to be paid out of the current earnings, which would have been paid if the company had continued in possession," and that it made no difference that the debt was represented by notes, "with a somewhat extended credit to meet the business requirements of what may have been, and probably was, at the time, an embarrassed railroad company." (Burnham vs. Bowen, 111 U. S. 778.)

(2.) "When a Court of Chancery takes possession of a mortgaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it received from earnings, all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income, should be paid from the income before it is applied in any way to the use of the mortgagees." (Burnham vs. Bowen, 111 U. S. 780.)

(3.) "When, therefore, the Court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders, at the expense of the labor and supply creditors, there was such a diversion of what is denominated in Fosdick vs. Schall, the 'current debt fund,' as to make it proper to require the mortgagees to pay it back." (Burnham vs. Bowen, 111 U. S. 782.)

The law laid down by the Circuit Court of Appeals, may be stated, therefore, in the precise language used by this Court in the case of Burnham vs. Bowen. This sufficiently indicates that no question so new in its character, or important in its nature is presented, as to justify this application.

The decree of the Court below was inevitable upon the facts as that Court found them to exist. Those facts, as they appear in the opinions filed, are relied upon here to distinguish the case from the petitioner's conception of it, and are set forth in this brief only to the extent necessary to illustrate some of the most striking points of difference.

The whole contention of the petitioner to bring the case within the class of cases in which the Court will act, is predicated upon its statement, that the bondholders, recorded lien is impaired, and a general creditor paid out of the corpus of the property to their detriment. This is not the case. The whole scope of the decision is to the effect that the Court having seen fit, for the purpose of enabling the railroad to perform its public duties, to take money which should have been applied to paying this supply creditor, and use it in new construction and new equipment, thereby increasing to that extent the mortgagee's security, now requires that mortgagee to return the money so diverted and used for its benefit, so far as is necessary to pay off this supply creditor.

The brief for the petitioner cites a number of authorities decided since that time. Upon examination, it will be found that they do not modify the rules stated in Burnham vs. Bowen as applying to the present state of facts. The present claim rests upon the fact that during the receivership the property has made large net earnings, and the same have been diverted from the payment of current debt claims to the payment of interest or to the permanent improvement of the property. These facts distinguish the case precisely from the case of Kneeland vs. American Loan and Trust Company, 136 U. S., upon which the petitioner so much relies, for the Court there remarks:

> "It is important to note these facts:
>
> "First. This case is not embarrassed by any matter of surplus earnings, for it appears beyond any possibility of doubt that from the time of the purchase of this rolling stock to the time of the final disposition of these cases, the receipts did not equal the operating expenses. There was no diversion of the current earnings either to the payment of interest or to the improvement of the property." (Page 96.)

The same observations apply to Thomas vs. Western Car Company, 149 U. S. 95. Neither of these cases had nothing to do with the question of diversion of income earned by the property or in the hands of a receiver, but they both

involved the question whether current debt claims should displace vested liens of mortgagees. So too, in the case of Bound vs. South Carolina Railway Co., 58 Fed. Rep., 473, which the brief in behalf of the petitioner, (page 10,) erroneously states was disregarded *sub silantio* by the Court below. It will be found in both the opinions rendered in the case at bar, it is pointed out that the Bound case decides merely that one accepting a note could not object to an application of earnings during the term of credit to the payment of debts other than his own; that there was no proof of earnings by the receiver diverted from supply creditors, and that the effort was to obtain a priority over the mortgage and be paid out of the proceeds of sale of the corpus of the railroad.

These considerations sufficiently answer the third, fourth, fifth and seventh sub-divisions of the brief in behalf of the petitioner. So far as concerns the first, second and sixth sub-divisions of the same, it will be noticed that they are inconsistent and are mere efforts toward a strained construction of the Virginia lien statute, which are not supported by authority and have no present importance inasmuch as the decree found in behalf of the respondent generally.

The eighth sub-division of the petitioner's brief, claims that the allowance of interest was improper. In support of this contention, the brief cites, Thomas vs. Western Car Company, 149 U. S. 95, 116. It will be seen that this case has no application to the present one. The question there was not regarding the diversion of the earnings of the property, but whether interest should be allowed out of the corpus of the mortgaged premises. The Court held that under the circumstances of the case it should not, inasmuch as those proceeds were far short of sufficient to pay the mortgage debt. It stated that it was a rule that after property of an insolvent passes into the hands of a receiver or of an assignee in bankruptcy, interest is not allowed on the claims against the funds. This, of course, has application merely to the distribution of a fund among creditors of

equal rank and equally entitled to a share therein, and perhaps applies in its full extent only where this fund is insufficient to pay such claims in full, with interest. If the fund is sufficient to pay interest, the creditors are entitled thereto, and any creditor having a superior equity is entitled to interest prior to any payment to the parties next in rank, (National Bank of the Commenwealth vs. Bank, 94 U. S. 437, 441; Richmond vs. Irons, 121 U. S. 27, 66.) In New England Railway Company vs. Carnegie Steel Company, 75 Fed. Rep. 54, the Court said that if the petitioner had shown that there was a fund in the hands of the receivers or their privies especially applicable to the payment of this claim, which would not have been exhausted by the allowance of interest, the interest might perhaps have been computed. This is precisely what the Court below in the present case has held to be the fact. The allowance of interest is in large measure discretionary. The result reached in that regard can have no importance save only to the immediate parties to the litigation.

It is submitted that this Court will not grant a writ of certiorari merely for the purpose of inquiring into the existence of the facts and the propriety of the exercise of its discretion, in this particular made by the Court below.

It is further submitted that the real objection made by the petitioner is to the finding of the Court below that the receivers had as a matter of fact used net earnings in their hands for the benefit of the mortgagee.

This is a question of fact, not of law, and this Court will not issue a writ of certiorari for the purpose of inquiring into the correctness of the decision on this point.

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